

## RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1621-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

O.C.Q.,

Defendant-Appellant.

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Submitted November 28, 2016 — Decided December 13, 2016

Before Judges Sabatino, Haas and Currier.

On appeal from Superior Court of New Jersey,  
Law Division, Ocean County, Indictment No. 14-  
03-0489.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Theresa Yvette Kyles, Assistant  
Deputy Public Defender, of counsel and on the  
brief).

Christopher S. Porrino, Attorney General,  
attorney for respondent (Jeffrey P. Mongiello,  
Deputy Attorney General, of counsel and on the  
brief; Jane C. Schuster, Deputy Attorney  
General, on the brief).

PER CURIAM

After a two-day jury trial, defendant O.C.Q.<sup>1</sup> was convicted of second-degree attempted sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(b), and third-degree endangering the welfare of a child, eight-year-old L.M. ("Laurie"), N.J.S.A. 2C:24-4(a). Defendant appeals his conviction on various grounds. We affirm.

## I.

Laurie, her father D.M., and his girlfriend J.W., were neighbors of defendant. The State's proofs at trial showed that defendant attempted to inappropriately touch and kiss Laurie and that he unzipped her pants.

The accusations came to light when Laurie's father and his girlfriend returned from a Christmas party with her in December 2012. They noticed defendant sitting outside on his porch and went over to say hello. While in defendant's presence, Laurie acted uncomfortably. J.W. asked Laurie about this when they got home, at which point Laurie disclosed that defendant had previously tried to kiss her with his tongue.

J.W., along with Laurie's father, then spoke to the child later that evening. Laurie amplified her narrative, indicating that when she had previously gone over to defendant's house, he

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<sup>1</sup> We use initials for defendant and other individuals named in the record, as well as a pseudonym for the child, in order to protect the child's privacy.

had touched the front of her pants and tried to unzip them. This prompted the father to contact the child's mother, A.B., who reported the allegations to the Ocean County Prosecutor's Office.

The following day, A.B. took Laurie to the Prosecutor's Office, where a detective with the Special Victim's Unit, Melissa Matthews, conducted a videotaped interview of the child. During that interview, Laurie repeated that defendant had unbuttoned her pants and tried to put his tongue in her mouth.

As the investigation unfolded, Matthews and another officer from the Prosecutor's Office, both in plainclothes, along with a local police officer in uniform, arrived that same day at defendant's residence. They told defendant they needed to speak with him regarding an "allegation" and requested that he come down to their office, which was located about a thirty-minute drive away. Defendant agreed to do so.

Defendant was transported without handcuffs in the officers' car to the Prosecutor's Office. Once there, defendant was provided with written Miranda<sup>2</sup> warnings in Spanish and signed a Miranda waiver. He was then interviewed by Detective Matthews for about thirty-five minutes. During the course of the interview, which was conducted in Spanish, defendant admitted that he might have

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

opened the victim's pants "by mistake" and that he might have "by accident opened [his] mouth" when he kissed her.

Defendant was arrested and subsequently charged with sexual assault and child endangerment. He moved prior to trial to suppress the incriminating statements he made during his stationhouse interview.

The trial court denied the motion to suppress. The court concluded that defendant was not in custody at the time of the interview. In addition, the court found that there was no Miranda violation or coercion during the course of the interview and that defendant had voluntarily waived his rights.

As a separate pretrial matter, the trial court conducted a Rule 104 hearing concerning the admissibility of Laurie's videotaped interview with the detective under the tender-years hearsay exception, N.J.R.E. 803(c)(27). With the exception of some slight redactions concerning the child's knowledge of defendant having been previously incarcerated for domestic violence with his former wife, the judge found the child's hearsay statements were otherwise sufficiently trustworthy to be admissible under that hearsay exception.

During the course of Laurie's trial testimony, she repeated her allegations of defendant's inappropriate touching, over the objection of defense counsel who contended that it was unfair to

have both the child's hearsay statements and her in-court testimony provided to the jury. The jurors also observed, likewise over objection, the videotaped police interview of defendant.

Defendant did not testify. He did not present any witnesses.

The jury found defendant guilty of both counts of the indictment. Thereafter, the trial judge imposed a five-year sentence on the attempted sexual assault count, with an eighty-five percent parole disqualifier, and a concurrent three-year sentence on the other count. Defendant does not challenge his sentence on appeal.

## II.

In his brief on appeal, defendant raises the following points for our consideration:

### POINT I

O.C.Q.'S STATEMENT TO DETECTIVE MATTHEWS SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE BECAUSE IT WAS TAKEN IN VIOLATION OF O.C.Q.'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. U.S.CONST. AMENDS. V, XIV.

A. O.C.Q. was in custody when he was interrogated.

B. O.C.Q.'s Statement to Detective Matthews was inadmissible because the detective violated O.C.Q.'s Fifth Amendment privilege against self-incrimination when she answered his question about [] hiring [a] lawyer in an inaccurate and misleading manner and failed to either stop the interrogation or to clarify

whether he wanted a lawyer with him when he was interrogated.

## POINT II

TESTIMONY REGARDING LAURIE'S OUT-OF-COURT STATEMENTS, WHICH WAS NOT SHOWN TO BE RELIABLE, DENIED DEFENDANT THE RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL. (U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, PARS. 1, 9, 10).

## POINT III

THE ADMISSION OF LAURIE'S PRIOR OUT-OF-COURT STATEMENTS HAD NO PURPOSE OTHER THAN TO UNFAIRLY BOLSTER THE CREDIBILITY OF THE STATE'S PRIMARY WITNESS AND, THEREFORE, DENIED DEFENDANT A FAIR TRIAL. U.S. Const. Amend. XIV; N.J. Const. Art. I, ¶ 1.

A.

We review the trial court's factual findings from the suppression hearing on defendant's self-incrimination claims under "a deferential standard." State v. Stas, 212 N.J. 37, 48 (2012). Our appellate function, as it relates to the facts, is simply to consider "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964); see also State v. Locurto, 157 N.J. 463, 471 (1999). We owe "deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy."

Johnson, supra, 42 N.J. at 161; see also Stas, supra, 212 N.J. at 49. By comparison, "with respect to legal determinations or conclusions reached on the basis of the facts," our review is plenary. Ibid.

Well-settled legal principles guide our analysis of the admissibility of defendant's statements to the police. In Miranda, the United States Supreme Court held that in order to protect a defendant's constitutional rights against self-incrimination, a person may not be subjected to custodial interrogation by the police unless he or she is apprised of certain rights. Supra, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719; accord Stas, supra, 212 N.J. at 50-53. In particular, the police must inform such a person that: he has the right to remain silent, anything he says can be used against him in a court of law, he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Miranda, supra, 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726.

The Court in Miranda further required that statements made to the police during a custodial interrogation be excluded at trial, unless it is shown that the defendant "knowingly and intelligently waive[d] these rights" in responding to the officers' questions. Ibid. See also J.D.B. v. North Carolina,

564 U.S. 261, 268, 131 S. Ct. 2394, 2401, 180 L. Ed. 2d 310, 321 (2011) (reiterating the significance of waiver) (internal quotation marks and citation omitted).

A prosecutor bears the burden of proving a defendant's voluntary waiver beyond a reasonable doubt. State v. Presha, 163 N.J. 304, 313 (2000). In making that assessment, our courts must look at the "totality of circumstances" involved. Ibid.; see also State v. Nyhammer, 197 N.J. 383, 402 (2009), cert. denied, 558 U.S. 831, 130 S. Ct. 65, 175 L. Ed. 2d 48 (2009). We consider in the waiver analysis such factors as defendant's age, education and intelligence; the advice given about his constitutional rights; the length of the detention; whether the questioning was repeated or prolonged; and whether physical punishment or mental exhaustion was involved. Presha, supra, 163 N.J. at 313; see also State v. Dispoto, 189 N.J. 108, 124-25 (2007) (noting that "fact-based assessments" are appropriate in considering the totality of circumstances and deciding whether a defendant voluntarily waived his rights).

Here, we agree with the trial court's conclusion denying suppression of defendant's statements to the police. The procedural safeguards of the Miranda doctrine attach when a criminal suspect is subject to a custodial interrogation. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d



714, 719 (1977). For purposes of our own analysis, we will assume, solely for the sake of discussion, defendant's premise that his statements at the police station were "custodial," based on his claim that a reasonable person in his circumstances would not believe that he was free to leave. Even so, we nonetheless concur with the trial judge that defendant voluntarily waived his right to remain silent during the police interview.

A person who is subjected to custodial police interrogation "must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." Miranda, supra, 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. When a suspect makes a statement that could be interpreted as a request for an attorney, the questioning must cease until an attorney has been made available or the accused "initiates further communication, exchanges, or conversation with the police." State v. Messino, 378 N.J. Super. 559, 577 (App. Div.), certif. denied, 185 N.J. 297 (2005) (internal citations omitted). An "equivocal request for an attorney is to be interpreted in a light most favorable to the defendant." State v. Chew, 150 N.J. 30, 63 (1997) (citing State v. Reed, 133 N.J. 237, 253 (1993)).

Applying these principles, we agree with the trial court that the circumstances do not reflect an unambiguous and valid invocation by defendant during the interview of his right to

counsel. Defendant notes that during the interview, after having been given Miranda warnings orally and in writing, he asked Detective Matthews whether he needed to get a lawyer. As we held in Messino, supra, 378 N.J. Super. at 578, the mere question, "Do you think I need a lawyer?," does not, in and of itself, connote a request for counsel. See also State v. Alston, 204 N.J. 614, 620, 625-26 (2001) (treating a suspect's query of "Should I not have a lawyer?" in the same manner).

The interview transcript reflects that defendant specifically asked Matthews, "Do I have to hire a lawyer, so he can defend me, or what?" As we noted in Messino, such a question that merely inquires as to whether defendant needs a lawyer "readily may be distinguished from other statements considered to be requests for counsel." Supra, 378 N.J. Super. at 578. Matthews responded,

There is not a lawsuit. If you want to talk to me, you have the right to talk to me without a lawyer, or talk to me and then decide, you know what, I don't want to talk anymore, I want a lawyer.

Defendant attempts to distinguish his case from the facts in Messino, because he raised his query about getting counsel after being asked by the detective what he did not understand about his Miranda rights. Matthews then provided him what she felt was sufficient clarification. Defendant asserts that her response, in which she did not reiterate that he could be appointed an

attorney, "was no answer to the question [he had posed] and effectively subverted his Fifth Amendment right to counsel."

As case law recognizes, the police are permitted to clarify an individual's Miranda rights when necessary. Indeed, such clarification may be needed "if the [suspect's] statements are so ambiguous that they cannot be understood to be the assertion of a right[.]" Alston, supra, 204 N.J. at 624. Defendant asserts that Matthews's clarification here was not adequate, because it "explained that [defendant] had two options, two 'rights,' each of which involved talking to her without a lawyer, at least initially[.]" Defendant contends that this clarification therefore left out what he characterizes as his "third and fourth options – not talk to her at all, or to wait until an attorney was provided and then talk to her[.]"

This argument, however, selectively ignores the first part of Matthews's response to defendant's question, in which she noted that those options applied "if" he chose to talk to her. Matthews appropriately responded to defendant's question with the clarification that he could speak to her with or without a lawyer, in the event that he chose to speak with her at all. There was nothing misleading or coercive about the detective's response. Once he was provided with that clarification, defendant

voluntarily chose to proceed with the interview, without counsel present.

In sum, defendant was clearly and appropriately told that he had the right to a lawyer and that one may be appointed for him, followed by a reasonable clarification to defendant's question about whether he needed a lawyer. As such, defendant's rights against self-incrimination were not violated when he waived his ability to cease the questioning and have an attorney present. We therefore affirm the denial of his suppression motion.

B.

Defendant separately contests the trial court's decision to admit Laurie's out-of-court statements to her household members and the detective. Our appellate review of this evidentiary ruling requires considerable deference. Such rulings generally "should be upheld 'absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment.'" State v. J.A.C., 210 N.J. 281, 295 (2012) (quoting State v. Brown, 170 N.J. 138, 147 (2001)); see also State v. Buda, 195 N.J. 278, 294 (2008). "An appellate court applying this standard 'should not substitute its own judgment for that of the trial court, unless "the trial court's ruling is so wide of the mark that a manifest denial of justice results."' " J.A.C., supra, 210 N.J. at 295 (quoting Brown, supra, 170 N.J. at 147).

Contrary to defendant's assertions, the trial court did not abuse its discretion in finding Laurie's hearsay statements sufficiently trustworthy under the tender years exception, N.J.R.E. 803(c)(27). The exception was crafted by our Supreme Court to admit into evidence certain trustworthy hearsay statements of young child victims of sexual assault. Under that exception:

A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

[N.J.R.E. 803(c)(27).]

As articulated in State v. D.R., 109 N.J. 348, 363 (1988), the "difficult problems of proof inherent in child sex abuse prosecutions" necessitated the adoption of this tender years

exception. 109 N.J. 348, 363 (1988). See also State in the Interest of A.R., \_\_\_\_ N.J. Super. \_\_\_\_, \_\_\_\_ (App. Div. 2016) (tracing the history and application of the tender years exception).

One of the primary requirements of the hearsay exception is that "the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy." N.J.R.E. 803(c)(27). In fact, "[t]here is general agreement that a prerequisite to the admissibility of a child's out-of-court statement concerning sexual abuse is that it possess sufficient indicia of reliability." D.R., supra, 109 N.J. at 363. These indicia of reliability may be established by the non-exclusive list of relevant factors outlined in Idaho v. Wright, 497 U.S. 805, 821-22, 110 S. Ct. 3139, 3150, 111 L. Ed. 2d 638, 656 (1990), i.e., "spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." State v. P.S., 202 N.J. 232, 249 (2010).

Defendant argues the trustworthiness of Laurie's hearsay statements to the detective and her father's girlfriend "was not satisfactorily established at the pre-trial hearing[.]" Defendant therefore contends that, because the court had "lingering

questions about matters affecting the trustworthiness of Laurie's statements[,]" the statements were not sufficiently reliable for admission under the tender years exception. We disagree.

After considering the totality of the circumstances, the trial court ultimately and reasonably found Laurie's out-of-court statements trustworthy under the tender years exception. The court specifically addressed several of the Wright factors in its decision, first finding that Laurie "spontaneously made the allegations indicating with regard to a kiss and . . . the attempted use of the tongue." These statements, the court noted, were "consistent throughout each one of the conversations." The court also found that Laurie was not "suffering any unusual mental state or anything that would cause her to make untrustworthy statements." These findings are reasonably supported by the record.

In addition, the trial court considered whether Laurie had a motive to fabricate, a point which the defendant asserts undermined the trustworthiness of her statements. The court recognized that "if the child was present when the parents had spoken poorly of the defendant on prior occasions that . . . she would have a motive to fabricate a story making him appear to be a vill[a]in." However, the court further found, after hearing additional testimony, that "the parents did not do that . . . [and] any

conversations that [Laurie] was privy to were from the . . . defendant's daughters." Based on the court's findings that "[t]here w[ere] no conversations or information provided by the parents to the child that would create any kind of motive[,]" the court ruled that Laurie's hearsay statements were trustworthy under the totality of the circumstances.

We discern no error in the trial court's analysis of this issue. The court very clearly outlined its reasoning for finding Laurie's statements trustworthy, including the consistency and repetition of her spontaneous allegations. The court also addressed defendant's primary concern on appeal that Laurie had a motive to fabricate because she knew of defendant's criminal history. The court was satisfied, based on the testimony presented, that Laurie did not have such a motive to fabricate. As we previously noted, there is ample evidence in the record to support all of these findings.

Applying our appropriate scope of review, we conclude that the trial court did not abuse its discretion, nor misapply the laws of evidence, when it ruled that Laurie's out-of-court statements were admissible under N.J.R.E. 803(c)(27).

In a related argument, defendant contends that the cumulative admission of Laurie's hearsay statements under the tender years exception, along with her in-court testimony, violated his right



to a fair trial, as those hearsay statements had no purpose but to "bolster the credibility of the State's primary witness[.]" However, subject to Confrontation Clause limitations that are neither pertinent nor invoked here, the tender years exception clearly allows for child victims to testify, where they are available, in addition to the admission of their hearsay statements.

Indeed, the clear language of the tender years exception only allow the hearsay statements to be admitted without the child's trial testimony in limited situations where the statements are corroborated by other evidence. See N.J.R.E. 803(c)(27)(c)(ii). Otherwise, absent such corroboration, the child's testimony at trial is required as a predicate to the admission of her earlier hearsay account. Ibid. As we noted in State v. Donegan, 265 N.J. Super. 180, 186 (App. Div. 1993), having a child who is a declarant testify at trial "provide[s] the court a uniquely valuable opportunity, by taking into account both her taped interview and her in-court testimony, to evaluate credibility factors, such as demeanor and consistency." (Emphasis added).

We are mindful that under N.J.R.E. 403, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of . . . (b) undue delay, waste of time, or needless presentation of cumulative evidence." Even when evidence is

admissible under the tender years exception, "the trial court 'should be cognizant of its right under N.J.R.E. 403 to exclude evidence, if it finds in its discretion, that the prejudicial value of that evidence substantially outweighs its probative value.'" State v. Burr, 392 N.J. Super. 538, 572 (2007) (quoting State v. D.G., 157 N.J. 112, 128 (1999)).

The defendant in Burr made substantially the same failed argument that defendant makes in this appeal – namely, that the presentation of cumulative and repetitive testimony under the tender years exception had an unduly prejudicial effect. Ibid. The court in Burr found, however, the out-of-court statements had additional probative value that outweighs any such asserted prejudice.

Here, as in Burr, supra, 392 N.J. Super. at 573, Laurie's initial disclosures to her father and his girlfriend, and her interview with the detective the following day in December 2012, occurred much closer in time to the alleged sexual incidents than her trial testimony in March 2014. The recorded interview at the Prosecutor's Office also gave Laurie an opportunity to convey her account to a neutral party outside of her household. And, as was noted in Donegan, having the child testify at trial provides a valuable additional opportunity for the fact-finder to assess her

credibility, including that of her hearsay accusations. Supra, 265 N.J. Super. at 186.

Moreover, the rejection in 1998 of a proposed amendment to the tender years hearsay exception that would have disallowed the child's out of court statements if the child also testified, further supports the admission of both the hearsay statement and in-court testimony. See also A.R., supra, \_\_\_ N.J. Super. at \_\_\_ (noting the rejection of the proposed amendment).

Given the record before us in light of the applicable law, we reject defendant's claim that the cumulative effect of admitting both the child victim's out-of-court statements and her in-court testimony was unduly prejudicial. The child's statements were properly admitted as further proof of the veracity of her in-court account. See Burr, supra, 392 N.J. Super. at 573; see also State v. Smith, 158 N.J. 376, 389-91 (1999).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION